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519332—43

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 776

DWIGHT D. CLARKE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 522–530) is reported at 132 F. (2d) 538.

JURISDICTION

The judgment of the circuit court of appeals was entered December 31, 1942 (R. 531), and a petition for rehearing was denied February 6, 1943 (R. 532). The petition for a writ of certiorari was filed March 2, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and

Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether, in view of the fact that the trial judge had correctly instructed the jury that the mailings alleged in an indictment under the mail fraud statute must have been for the purpose of executing the scheme to defraud, the judge's passing reference at a later point in his charge to use of the mails "in connection with" the scheme, misled the jury so as to constitute prejudicial error.

STATUTE INVOLVED

The mail fraud statute (Section 215 of the Criminal Code, 18 U. S. C. 338) provides in part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, * * * in any post office, * * * or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, * * * or shall knowingly cause to be delivered by mail according to the direction thereon, * * * any such letter, postal card, package, writ-

ing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

STATEMENT

Petitioner and Tom Drummey were indicted on December 12, 1940, in the district court for the western district of Washington in four counts charging them with using mails in the execution of a scheme to defraud Mrs. Jean Hunter (R. 2–13). The indictment alleged that the defendants, together with Lester Main, then deceased, having learned that Mrs. Hunter owned a large number of highly valuable shares of the stock of the Coca-Cola Company and the Coca-Cola International Corporation, planned and schemed to procure possession of, and authority to sell, the shares for the pretended benefit of Mrs. Hunter and her family, but in truth and in fact for the purpose of gaining control of the proceeds of the shares and converting them to their own use and benefit and the benefit of certain business concerns in which they were interested (R. 2–3). It was further alleged that in order to induce Mrs. Hunter to deliver the shares to them the defendants and Main represented to her that the Coca-Cola Company was in a precarious business condition and was likely to fail within two years, that, consequently, it was unsafe for her to retain her shares in that company and the Coca-Cola International Corporation, that it would be more advisable for

her to deliver the shares to them for sale and allow them to invest the proceeds in safer and more desirable securities, and that the defendant Drummey was a man of large experience in such matters and a person in whom Mrs. Hunter could safely repose confidence and who would manage her affairs in the safest and most advantageous way (R. 3–4). The indictment then alleged that these representations were false, that by means of them the defendants and Main induced Mrs. Hunter to deliver to them all of her fortune in Coca-Cola Company and Coca-Cola International Corporation stock, and that they sold the stock and converted almost all of the proceeds to their own use and benefit and for the benefit of failing and practically worthless business enterprises in which they were interested (R. 4–5). Each count alleged a separate mailing for the purpose of executing the scheme. The mailings upon which the first and second counts were based were registered air mail parcels addressed to E. A. Pierce & Co., New York City, and containing certificates for shares of the stock of the Coca-Cola Company and the Coca-Cola International Corporation (R. 5–6, 6–7). The mailing described in the third count was a letter from Drummey, as president of the Seattle Loan & Discount Company, to petitioner (R. 8–10), and that described in the fourth count was a letter from Drummey to Mrs. Hunter (R. 10–13).

Petitioner and Drummey were convicted on all four counts (R. 19), and petitioner was sentenced

to four years' imprisonment on each, the sentences to run concurrently (R. 22–33). On appeal by petitioner alone, the circuit court of appeals affirmed his conviction (R. 531).[1]

ARGUMENT

Petitioner's sole contention (Pet. 4–5, 8–11) is that the trial judge committed reversible error when, in the course of his charge to the jury, he stated that if they found that the defendants or either of them had devised or joined in a scheme to defraud Mrs. Hunter and "did use or cause the mails to be used in connection therewith," it would be the duty of the jury to find such defendant or defendants guilty (R. 488–489).[2] Petitioner cor-

[1] Petitioner does not challenge the sufficiency of the evidence to support the conviction and, therefore, we deem it unnecessary to delineate the proof adduced at the trial. The evidence is summarized in the opinion of the circuit court of appeals (R. 524–527) and the court held that it was sufficient to support the verdict both as to the scheme alleged in the indictment and as to the causing of the indictment letters to be mailed in the execution of the scheme (R. 528).

[2] The text of the portion of the instructions of which petitioner complains is as follows (R. 488–489):

"The jury is further instructed that if they are convinced beyond a reasonable doubt from the evidence that the defendants or either of them, did devise a scheme or artifice or joined in a scheme or artifice to defraud Mrs. Hunter and did use or cause the mails to be used in connection therewith, that it is the duty of the jury in such event to find such defendant or defendants, guilty of such count or counts, regardless of whether the jury might believe that Mrs. Hunter agreed to sell her Coca Cola stock to Mr. Drummey at 10% below the market on the sale date or agreed to sell through him as a broker, as in neither event would anyone have a right to defraud Mrs. Hunter."

rectly states (Pet. 9) that the gist of the offense under Section 215 of the Criminal Code (*supra*, pp. 2–3) is the use of the mails for the purpose of executing a scheme to defraud or attempting so to do,[3] and his argument is that the instruction referred to was bad because it did not require the jury to find that the mails were used for that purpose, but allowed them to convict if they found that the mailings were merely connected with the scheme (Pet. 10). A reading of the charge as a whole,[4] however, readily shows that there is no merit in petitioner's contention.

In an earlier part of the charge devoted specifically to expounding to the jury the nature and elements of the crime denounced by the mail fraud statute and alleged in each count of the indictment, the trial judge carefully explained that the of-

[3] *Badders* v. *United States*, 240 U. S. 391, 393–394; *United States* v. *Young*, 232 U. S. 155, 161; *Durland* v. *United States*, 161 U. S. 306, 315; *Stapp* v. *United States*, 120 F. (2d) 898, 899 (C. C. A. 5); *Lonergan* v. *United States*, 88 F. (2d) 591, 594 (C. C. A. 9), reversed on other grounds, 303 U. S. 33; *Brady* v. *United States*, 24 F. (2d) 399, 402 (C. C. A. 8); *Byron* v. *United States*, 273 Fed. 769, 771–772 (C. C. A. 9), certiorari denied, 257 U. S. 653.

[4] It is settled that the trial court's charge to the jury must be considered in its entirety. *Graham* v. *United States*, 120 F. (2d) 543, 546 (C. C. A. 10); *Martin* v. *United States*, 100 F. (2d) 490, 497 (C. C. A. 10), certiorari denied, 306 U. S. 649; *Haggerty* v. *United States*, 5 F. (2d) 224, 226 (C. C. A. 7); *Colt* v. *United States*, 190 Fed. 305, 308 (C. C. A. 8), certiorari denied, 223 U. S. 729; *Horn* v. *United States*, 182 Fed. 721, 740 (C. C. A. 8), certiorari denied, 219 U. S. 585; see also *United States* v. *Schenck*, 126 F. (2d) 702, 708 (C. C. A. 2), certiorari denied *sub nom. Moskowitz* v. *United States*, 316 U. S. 705; cf. *Mills* v. *United States*, 164 U. S. 644.

fense consists "of two parts, (1) the devising the scheme or artifice to defraud or for obtaining money or property from another by means of false or fraudulent pretenses and promises and (2) the mailing or causing to be mailed within the jurisdiction of the Court some article of mail matter in furtherance of such scheme or plan" (R. 473); that "It is the purpose inspiring the sending of the matter through the mail that brings the one causing the matter to be mailed within the Mail Fraud Law" (R. 474); and, again, that "the mail matter must have some relation to and be a step in the attempted execution of the scheme and must be mailed or cause (*sic*) to be mailed with the intent to aid its execution" (*ibid.*).[5] The particular instruction of which petitioner complains appears in a subsequent portion of the charge in which the judge cautioned the jury that certain inferences which they might draw would not exculpate the defendants (R. 486–487, 487–489), and, as appears from its context (n. 2, p. 5, *supra*), the import of the instruction was that the jury could not acquit merely because they might believe that Mrs. Hunter agreed to sell her stock to the defendant Drummey at 10 percent below the market value or to sell through him as agent, "as in neither event would anyone have a right to defraud Mrs. Hunter" (R. 489).

[5] In addition, at other points in his charge, the judge iterated that the use of the mails must be in furtherance of a scheme to defraud (R. 468, 487–488; see also R. 465, 470–471, 479).

Although, as the court below observed, the instructions were "not a model of clarity with respect to the point urged" (R. 530), it can scarcely be said that by his passing use of the phrase "in connection with"[6] the trial judge purported to modify his earlier correct instructions that the mailings must have been for the purpose of executing the scheme to defraud, or that this phrase misled the jury as to the nexus required by the statute between the scheme to defraud and the use of the mails. Moreover, there is no contention by petitioner that the mailings were not, in fact, in execution of the scheme.[7]

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[6] This phrase appears in two other passages in the charge (R. 468, 473), but it is clear from the context that it was used in the sense of "in furtherance of" the scheme to defraud.

[7] Although petitioner states (Pet. 4) that there was no proof that he personally mailed or caused to be mailed any of the indictment letters, he does not deny the sufficiency of the evidence to support the jury's finding that he was a party to the scheme to defraud. The issue whether petitioner was chargeable with the mailings was submitted to the jury under instructions that "The defendants would be guilty if they devised or helped devise the unlawful scheme and caused an innocent party to place the package in the post-office in furtherance thereof," and that they "would be responsible if the matter were placed in the mail in the ordinary course of business as a natural and probable consequence of the plan or scheme that had been devised and for the purpose of forwarding the same. If there is in operation such a scheme, any defendant consciously and knowingly cooperating therein is responsible for the mailings although he may not have known of the particular act of mailing at all" (R. 473–474). In addition, the court instructed the jury to the effect that if the defendants joined in the scheme to defraud there was, in the contemplation of the law, a conspiracy, and each

CONCLUSION

The decision below is correct, and there is involved no conflict of decisions or question of general importance. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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APRIL 1943.

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of them became responsible for the acts of the other in furtherance of the common plan (R. 474–475). These instructions were correct. *United States* v. *Kenofsky*, 243 U. S. 440, 443; *Stapp* v. *United States*, 120 F. (2d) 898, 899 (C. C. A. 5); *Hart* v. *United States*, 112 F. (2d) 128, 131 (C. C. A. 5), certiorari denied, 311 U. S. 684, 722; *United States* v. *Weisman*, 83 F. (2d) 470, 472–473 (C. C. A. 2), certiorari denied, 299 U. S. 560; *Alexander* v. *United States*, 95 F. (2d) 873, 880 (C. C. A. 8), certiorari denied, 305 U. S. 637; *Cochran* v. *United States*, 41 F. (2d) 193, 199–200 (C. C. A. 8); *United States* v. *Herzig*, 26 F. (2d) 487, 489 (S. D. N. Y.); *Chambers* v. *United States*, 237 Fed. 513, 524 (C. C. A. 8).

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